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Supreme Court, U.S.
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No. 95-40

In The

Supreme Court of the United States

October Term, 1995

KMART CORPORATION,

Petitioner,

vs.

LARRY LAUGHLIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the issues sought to be presented to the Supreme Court are moot by virtue of this action having been remanded by the District Court to state court and the continuance of proceedings in state court.

2. Whether the failure even to allege that the amount in controversy was in excess of the jurisdictional minimum meets the requirements to justify removal, especially where the Petition for Removal attached the Petition filed by Petitioner in state court did not state that the claim exceeded $50,000.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Statutes and Rules Involved 1

Statement of the Case 2

Reasons for Denying the Writ 2

I. The matter presented to the Supreme Court is now moot and does not fall within an exception to the mootness doctrine. 2

II. Removal of the instant case to federal court was procedurally defective. 4

Conclusion 5

TABLE OF CITATIONS

Cases Cited:

DeAguilar v. Boeing Co., 11 F.3d 55 (5th Cir. 1994) 3

Securities and Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 92 S. Ct. 577, 30 L. Ed. 2d (1972) 3

Contents

	Page
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 31 S. Ct. 279, 283, 55 L. Ed. 310 (1911)	3
Statutes Cited:	
28 U.S.C. § 1332	4
28 U.S. § 1441	4
28 U.S.C. § 1446(a)	4
28 U.S.C. § 1447(c)	1, 2
28 U.S.C. § 1447(d)	1, 2
Rule Cited:	
Federal Rule of Civil Procedure 8(a)	1, 4
APPENDIX	
Appendix A — Relevant Statutes and Rules Involved	1a

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES AND RULES INVOLVED

In addition to the statutes and rules set forth by Petitioner, the following statutes and rules, which are fully reprinted in Appendix A, are involved: 28 U.S.C. § 1447(c), (d); and Rule 8(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Since the Tenth Circuit has denied rehearing, the United States District Court for the Northern District of Oklahoma has remanded the case to the District Court of Tulsa County, Oklahoma, where it originated, pursuant to the Court of Appeals decision. The Tulsa County District Court has taken and pursued actions to process the case through the state court system.

REASONS FOR DENYING THE WRIT

I.

THE MATTER PRESENTED TO THE SUPREME COURT IS NOW MOOT AND DOES NOT FALL WITHIN AN EXCEPTION TO THE MOOTNESS DOCTRINE.

Since the Tenth Circuit has reversed the decision of the trial court and ordered the trial court to remand the case to the District Court of Tulsa County, the United States District Court for the Northern District of Oklahoma has fulfilled its duty; the case has been remanded to state court. Such action renders moot anything that the Supreme Court could now do.

28 U.S.C. § 1447(c) indicates that when a certified copy of the order of remand is mailed by the clerk to the clerk of the state court, the state court may thereupon proceed with such case. Such events have now occurred.

28 U.S.C. § 1447(d) provides that an order remanding a case to the state court from which it was removed "is not reviewable on appeal or otherwise." Since such an order has now been made remanding the case to state court and since the state court is proceeding with the case, such decision is not reviewable on appeal or otherwise. In other words, this Court cannot, no matter

how it decides the matter, get the case back into the federal system and any decision rendered by this Court would be ineffective to change the proceedings of the state court. As such, the matter before this Court is now moot.

Exercise of federal judicial power depends upon the existence of a case or controversy. Where, as here, any issue to be decided by this Court would have no effect, then judicial power may not be exercised. *Securities and Exchange Commission v. Medical Committee for Human Rights,* 404 U.S. 403, 92 S. Ct. 577, 30 L. Ed. 2d (1972).

There is an exception to this mootness doctrine as set forth in *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L. Ed. 310 (1911). That exception is where a matter is "capable of repetition, yet evading review." Such is not the case here. Although the question here presented could be repeated and evade review, that could happen only when the case is remanded for lack of jurisdiction. However, as noted by the Petitioner, other circuits have ruled contrary to the Tenth Circuit on similar questions and have ruled in ways that would permit review by this Court. Indeed, it is Respondent's understanding that there is presently pending before this Court a Petition for Certiorari filed by a petitioner claiming lack of federal removal jurisdiction in a case arising out of the Fifth Circuit, *DeAguilar v. Boeing Co.,* 11 F.3d 55 (5th Cir. 1994). Respondent submits that if this Court wishes to deal with the questions raised by Petitioner herein, that it can do so in other cases that do not have the jurisdictional impediments that this does, namely mootness.

II.

REMOVAL OF THE INSTANT CASE TO FEDERAL COURT WAS PROCEDURALLY DEFECTIVE.

When Respondent brought this action in state court, he sought damages in excess of $10,000. Thus, the Petition filed in state court did not, on its face, meet the amount in controversy requirements of 28 U.S.C. § 1332 which would allow removal pursuant to 28 U.S.C. § 1441. 28 U.S.C. § 1446(a) requires that a notice of removal contain a short and plain statement of the grounds for removal. This would include "a short and plain statement of the grounds upon which the court's jurisdiction depends". Federal Rule of Civil Procedure 8(a). The Notice of Removal filed herein does state the citizenship of the Petitioner and Respondent, but does not allege that the amount in controversy meets the statutory requirement. Respondent submits that this is a procedural defect militating against the grant of a writ of certiorari.

CONCLUSION

Because the underlying case has now been remanded to state court, any decision rendered by this Court would have no effect as the remand Order of the District Court is not reviewable. Additionally, procedural defects in this case militate against a grant of certiorari. Finally, the issues raised in this case, to the extent that there is a conflict among the circuits, can be addressed in other cases that do not have the postural defects present here. Accordingly, Respondent respectfully submits that this case is not appropriate for this Court's review.

Respectfully submitted,

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APPENDIX A — RELEVANT STATUTES AND RULES INVOLVED

28 United States Codes § 1447(c), (d):

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within thirty (30) days after the filing of the notice of removal under § 1446 (a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an Order remanding a case to the State court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise.

Rule 8 (a) of the Federal Rules of Civil Procedure:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, unless the Court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief and (3) a demand for judgment for the relief that pleader seeks. Relief in the alternative or of several different types may be demanded.